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RECORD AND BRIEFS

Nos. 17-71, 17-74

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,

Respondents.

MARKLE INTERESTS, L.L.C., *et al.*,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government.

Central to the notion of a limited government is the constitutional principle of enumerated powers: those powers not explicitly delegated to the federal government are reserved to the States and the people. These limited powers include Congress's power to

[1] Pursuant to Supreme Court Rule 37.2(a), all parties consent to the filing of this amicus curiae brief and received notice at least 10 days prior to the due date. Pursuant to Supreme Court Rule 37.6, the undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

make rules regulating interstate commerce, as conferred by the Commerce Clause. U.S. Const. art. I, § 8, cl. 3. Legislation that reaches beyond Congress's constitutional authority results in a federal government that is no longer limited and ethical, and further erodes individual liberty, the right to own and use property, and the free enterprise system. Accordingly, MSLF has been actively involved in litigation challenging Congress's power under the Commerce Clause. *E.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*") (amicus curiae).

MSLF has also been actively involved in the proper interpretation and application of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq*. *E.g.*, *Shuler v. Babbitt*, 49 F. Supp. 2d 1165 (D. Mont. 1998) (successfully represented livestock operator charged with unlawfully taking a grizzly bear). More specifically, MSLF has sought to prevent the ESA from reaching activities on private land and purely intrastate species. *See, e.g.*, *People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Serv.*, 852 F.3d 990 (10th Cir. 2017) ("*PETPO*"); *San Luis & Delta-Mendota Water Authority v. Salazar*, 638 F.3d 1163 (9th Cir. 2011).

If the panel majority's expansive interpretation of the U.S. Fish and Wildlife Service's ("FWS") authority under the ESA is allowed to stand, nothing will be beyond the reach of federal regulation, and the principles of federalism enunciated by this Court's distinction between "what is truly national and what is truly local"

in *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) will be a dead letter.

STATEMENT OF THE CASE

On June 12, 2012, the FWS designated 1,544 acres of private land in Louisiana, owned and controlled by Petitioners, as critical habitat for the dusky gopher frog, an endangered species found solely in Mississippi. *Markle Interests, LLC v. U.S. Fish and Wildlife Serv.*, 827 F.3d 452, 459 (5th Cir. 2016); 77 Fed. Reg. 35,118 (June 12, 2012). This designation was made despite the land being unoccupied and uninhabitable by the dusky gopher frog, as the land only contained one of the three "primary constituent elements" (*i.e.*, biological or physical features) necessary for the frog's survival. 77 Fed. Reg at 35,131, 35,135. For the frog to survive on Petitioners' uninhabitable land ("Unit 1"), significant modifications would be required, including burning down the existing loblolly forest, which is currently used for timber harvest, and replanting a long leaf pine forest. *Id.* at 35,132, 35,135. The FWS admits that Petitioners are not inclined to take such action, and cannot be forced to do so. *Id.* at 35,123, 35,129. The designation of Unit 1, by the FWS's own estimation, will cost the Petitioners up to $34 million in lost revenue. *Id.* at 35,141. Despite this heavy financial burden and knowledge of Petitioners' unwillingness to cease timber development, burn down the existing forest, and replant a new forest; FWS refused to exclude Unit 1 from the designation of critical habitat in favor of the

unquantifiable biological benefits that may occur if Petitioners were to change their minds. *Id.*; *Markle Interests*, 827 F.3d at 466.

Petitioners challenged the critical habitat designation, arguing, *inter alia*, that the designation was not a constitutional application of Congress's authority under the Commerce Clause. *Markle Interests, LLC v. U.S. Fish and Wildlife Serv.*, 40 F. Supp. 3d 744, 758 (E.D. La. 2014). After stating that the "Court is tempted to agree" that the FWS exceeded its constitutional authority by the "odd . . . agency action" of designating uninhabitable lands, the district court deferred to the agency action and therefore found itself "without power" to overturn it. *Id.* at 758-59.

On appeal, a divided panel of the Fifth Circuit affirmed, finding that the "regulated activity in question is the designation of Unit 1 as critical habitat," and therefore, all critical habitat designations may be aggregated to find a substantial effect on interstate commerce. *Markle Interests*, 827 F.3d at 476. Determining that the ability to designate critical habitat in general is essential to the ESA, which it found to be an "economic regulatory scheme[,]" the panel upheld the constitutionality of the designation of Unit 1. *Id.* at 476-79. Judge Owen dissented on the basis that, *inter alia*, land cannot statutorily be "essential" to the conservation of the species if it is uninhabitable by that species. *Id.* at 481, 483-85.

Petitioners filed a petition for rehearing en banc, which was denied by a sharply divided court. *Markle*

Interests, LLC v. U.S. Fish and Wildlife Serv., 848 F.3d 635 (5th Cir. 2017). Judge Jones, writing in dissent for the six-judge minority, explained that there are simply no "real limiting principles" in the panel majority's opinion: "[I]f critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then . . . the Service has free rein to regulate any land that contains any single feature essential to some species' conservation." *Id.* at 645, 649.

SUMMARY OF ARGUMENT

The absence of a limiting principle in the panel majority's opinion violates the Commerce Clause of the U.S. Constitution and necessitates this Court's review. According to the panel majority, the FWS may regulate any land that could, with enough time, money, and effort, be transformed into critical habitat. This interpretation would turn the FWS's already substantial power to protect threatened or endangered species and their habitats into a general police power akin to that reserved to the states. This Court has repeatedly held that, however broadly the Commerce Clause may be construed, it may not be read so as to eviscerate the distinction between what is truly national and what is truly local. There are outer boundaries to Congress's powers under the Commerce Clause, and, when an agency pushes the limits of those boundaries, its interpretation of the statute at issue is not accorded deference. The panel majority both failed to suggest a

convincing limiting principle to its holding and improperly deferred to the FWS's interpretation of its own power.

The panel majority compounded its flawed analysis by determining that the FWS's designation of Unit 1 fell within Congress's Commerce Clause power because, in the aggregate, critical habitat designations generally have a substantial effect on interstate commerce. By holding that the regulated activity to be aggregated is the regulation itself, the panel majority effectively insulated all species listings and critical habitat designations under the ESA from Commerce Clause challenges. Because the implications of shielding federal agency actions from judicial scrutiny under the Commerce Clause are far-reaching, this Court should grant certiorari.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER AN AGENCY IS ENTITLED TO DEFERENCE WHEN ITS INTERPRETATION OF THE STATUTE PUSHES THE OUTER LIMITS OF THE COMMERCE CLAUSE AND VIOLATES PRINCIPLES OF FEDERALISM.

Our federal government is one of limited, enumerated powers; "the States and the people retain the remainder." *Bond v. United States*, 134 S. Ct. 2077, 2086

(2014). The States have "broad authority to enact legislation for the public good – what we have often called a 'police power.' The Federal Government, by contrast has no such authority and 'can exercise only the powers granted to it.'" *Id.* (quoting *Lopez*, 514 U.S. at 567, and *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 405 (1819)). Congress has the enumerated power "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause power is limited in scope and "is subject to outer limits." *Lopez*, 514 U.S. at 557. One such limitation inherent in the Commerce Clause is that federal regulation may not reach activity that is purely local, lest Congress's "authority under the Commerce Clause [be converted] to a general police power of the sort retained by the States." *Id.* at 567-68 (There must be "a distinction between what is truly national and what is truly local."). Although some of this Court's decisions "have taken long steps" down that road in "giving great deference to congressional action[,]" *id.*, this Court has maintained that the "Founders denied the National Government" a general police power. *United States v. Morrison*, 529 U.S. 598, 618 (2000).

In derogation of this essential limitation on federal power, the panel majority determined that, under the ESA, the FWS could regulate private land located miles away from a species and its existing or potential habitat. *Markle Interests*, 827 F.3d at 466-67. Unit 1 bears no relation to the species sought to be protected,

other than that it contains, at most, one element necessary for survival of the species – "ephemeral ponds." *Id.* Even worse, the panel majority reached this conclusion by deferring to the FWS's reading of the ESA – a reading that interprets the ESA's requirement that critical habitat be "essential for the conservation of the species" to include non-habitat. *Id.* at 467-68 (citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)); 16 U.S.C. § 1532(5)(A)(ii). The panel majority's opinion is so deeply flawed that it crashes headlong into the outer limits of Commerce Clause authority, breezing by any federalism concerns in the process.

Since at least the time of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), this Court has recognized that Congress's enumerated powers, granted by the Constitution, place discernable limitations on its power to legislate, and when such legislation results in excessive federal encroachment, it is repugnant to the Constitution and must be stricken down. *Id.* at 177. In the context of the enumerated Commerce Clause power, this Court has repeatedly emphasized that the ability to regulate interstate commerce is a limited power, and is not analogous to the States' general police power. *Lopez*, 514 U.S. at 566. This Court "enforce[s] the 'outer limits' of Congress's Commerce Clause authority not for [its] own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government." *Gonzales v. Raich*, 545 U.S. 1, 42

(2005) (O'Connor, J., dissenting) (quoting *Lopez*, 514 U.S. at 557).

Here, the panel majority's use of *Chevron* deference to accept the FWS's interpretation of the ESA pushes the boundaries of the Commerce Clause. In *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"), this Court considered whether the agency's interpretation of "waters of the United States" as including seasonal ponds was entitled to deference when such interpretation "invokes the outer limits of Congress'[s] power[.]" *Id.* at 172-73. This Court determined that no deference was owed to the agency's interpretation because "the administrative interpretation alters the federal-state framework by permitting federal encroachment on a traditional state power[,]" specifically, "impingement of the States' traditional and primary power over land and water use." *Id.* at 173-74. Moreover, unless there was "a clear indication that Congress intended" the agency "to push the limit of congressional authority[,]" the agency's interpretation was not entitled to deference. *Id.* at 173. This Court then held the agency interpretation unconstitutional because, in regulating nonnavigable, isolated, intrastate waters, the agency exceeded Congress's powers under the Commerce Clause. *Id.* at 172-73.

This case presents almost identical concerns. Here, the FWS has interpreted its authority under the ESA in such an "unprecedented and sweeping" manner that "vast portions of the United States could be designated as 'critical habitat' because it is theoretically

possible, even if not probable, that the land could be modified to sustain the introduction or reintroduction of endangered species." *Markle Interests*, 827 F.3d at 481, 485 (Owen, J., dissenting). Far from being a "clear indication" from Congress that it intended to grant the FWS the authority to designate non-habitat as critical habitat, *see SWANCC*, 531 U.S. at 173, the "language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government." *Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). In fact, other courts that have considered the requirements for designation of *unoccupied* critical habitat have concluded that Congress intended the designation to be "more demanding," and a "more onerous procedure" than designating *occupied* critical habitat, which requires *all* of the physical or biological features necessary for the species to inhabit the land. *See Arizona Cattle Growers Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2009); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, (9th Cir. 2010); *see also* 16 U.S.C. § 1532(5)(A)(i). Therefore, the panel majority erred in deferring to the agency's expansive interpretation that it "has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features [necessary for the species' survival]." *Markle Interests*, 848 F.3d at 652 (Jones, J., dissenting from denial of reh'g en banc).

The panel majority's interpretation of the Commerce Clause also presents significant federalism concerns. If the ESA grants the FWS the authority to

designate as critical habitat non-habitat with no present relationship to the endangered or threatened species other than containing, at most, one feature essential for survival, then "the [FWS's] critical habitat designation power is virtually limitless." *Markle Interests*, 848 F.3d at 651 (Jones, J., dissenting) (listing physical and biological features the FWS regularly deems essential to species' conservation as including such amorphous categories as "upland areas" and "aquatic breeding habitat"). As this Court explained in *SWANCC*, under the "federal-state framework" of federalism, states have "traditional and primary power over land and water use." 531 U.S. at 173-74; *see also Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality) ("Regulation of land use . . . is a quintessential state and local power."). Similarly, in *Rapanos*, this Court rejected an exercise of federal agency power that would "authorize the [Army] Corps [of Engineers] to function as a *de facto* regulator of immense stretches of intrastate land – an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board."[2] *Id.* at 738 (plurality). Here, the FWS's attempt to regulate private

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[2] Similarly here, the FWS has already expanded upon the panel majority decision by enacting a regulation asserting the authority to designate as unoccupied critical habitat land which does not contain *any* of the physical or biological features necessary for a species' survival. *See* 81 Fed. Reg. 7,414, 7,427 (Feb. 11, 2016). This unprecedented power grab confirms Judge Owen's concern, so quickly dismissed by the panel majority, that now "the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological

land merely because it could, with enough taxpayer money and the owners' permission, be turned into critical habitat, is even more far-reaching than the issue in *Rapanos*. It is simply incompatible with federalism principles to hold that, under the ESA, the FWS may regulate "immense stretches of intrastate land" unconnected to the species that the FWS seeks to protect.[3] *Id.*; *see NFIB*, 567 U.S. at 536-37 (The Commerce Clause "must be read carefully to avoid creating a general federal authority akin to the police power[ ]" because " 'federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' " (quoting *New York v. United States*, 505 U.S. 144, 181 (1992))).

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element (to use the Service's vernacular) essential to the conservation of the species." *Markle Interests*, 827 F.3d at 489 (Owen, J., dissenting).

[3] The numerous rationales underlying our federalist system of government demonstrate why the FWS has overstepped its boundaries here. *See Bond*, 564 U.S. at 221 ("The federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.' " (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991))). Here, the critical habitat designation, by the FWS's own estimate, could result in $34 million in lost development value to Petitioners. 77 Fed. Reg. at 35,141. In stark contrast to the options available to Petitioners if such regulatory action were taken by the state or local government, Petitioners have no recourse to petition their government for relief when an unelected federal agency is the regulating entity. *See Markle Interests*, 827 F.3d at 473-74 (Panel majority suggesting that "the decision not to exclude [critical habitat] is unreviewable."); *but see id.* at 491 (Owen, J., dissenting) (agency's decision is not entitled to deference, much less unreviewable).

If there are indeed "[s]ome matters – those not within the bounds of the enumerated powers – [that] are simply beyond the reach of federal hands[,]" this must be one of them. *See* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 389 (2005).

The panel majority's deference to the FWS's interpretation of the ESA as conferring a boundless regulatory authority threatens the careful balance between local and federal powers that this Court has sought to achieve. Therefore, this Court should grant certiorari to prevent the FWS from interpreting the ESA in such a way that the Commerce Clause power would become coextensive with the states' police power.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE PANEL MAJORITY'S APPLICATION OF THE "SUBSTANTIAL EFFECTS" TEST WOULD PROVIDE NO STOPPING POINT TO FEDERAL AGENCIES' REGULATORY AUTHORITY OVER PRIVATE LAND.

As this Court recently explained, "[o]ur respect for Congress's policy judgments . . . can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed." *NFIB*, 567 U.S. at 538. In *Lopez*, this Court delineated three categories of activity that Congress may regulate under its Commerce Clause power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) those activities that

"substantially affect" interstate commerce. 514 U.S. at 558-59. At issue here is the third *Lopez* category, whether the FWS's designation of Unit 1 as critical habitat for the dusky gopher frog regulates "activities that substantially affect interstate commerce." *Id.*; *Markle Interests*, 827 F.3d at 475. This Court considers whether the regulated activity at issue is an economic one that, in the aggregate, substantially affects interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 128 (1942); *Lopez*, 514 U.S. at 561. The panel majority held that the FWS's designation of Unit 1 as critical habitat fell within Congress's Commerce Clause power by looking to whether critical habitat designations, in the aggregate, have a substantial effect on interstate commerce. 827 F.3d at 476 (finding that designation of Unit 1 should be "aggregated with all other critical-habitat designations nationwide"). In defining the regulated activity at issue as the regulation itself, the panel majority further convoluted the already-confused substantial effects jurisprudence among the circuits and landed at a conclusion that directly conflicts with the limits this Court has placed on Congress's Commerce Clause authority.

The circuits have consistently used the "substantial effects" test to circumvent any challenge to federal regulation of intrastate activity. *See Taylor v. United States*, 136 S. Ct. 2074, 2086-89 (2016) (Thomas, J., dissenting) (recognizing that the "substantial effects approach is at war" with the principle that the "Constitution requires a distinction between what is truly national and what is truly local."); Arthur B. Mark, III,

Currents in Commerce Clause Scholarship Since Lopez*: A Survey*, 32 Cap. U. L. Rev. 671, 738-39 (2004) ("*Morrison* and . . . *Lopez*[ ] have not been applied with any degree of impact by lower federal courts. . . . [There is] a need for the Supreme Court to provide a less malleable and more 'rule-like' standard for deciding Commerce Clause cases." (quoting Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 Ark. L. Rev. 1253, 1308-10 (2003))). Examples of overreaching federal regulation that the circuits have upheld under the substantial effects test are almost too numerous to choose from. *See Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1250-53 (11th Cir. 2008) (determining that Congress had the authority to abolish state tort liability for car rental companies when a rental car is involved in an accident because commercial leasing of cars has a substantial effect on interstate commerce); *United States v. Ho*, 311 F.3d 589, 602-04 (5th Cir. 2002) (aggregating a single instance of improper asbestos removal to find a substantial effect on interstate commerce due to air pollution under the Clean Air Act); *L.S. Starrett Co. v. F.E.R.C.*, 650 F.3d 19, 28-29 (1st Cir. 2011) (agency had power under the Commerce Clause to regulate a hydroelectric generator repair on private land because, without the repair, the electricity would come from an interstate grid); *but see United States v. McGuire*, 178 F.3d 203, 210-11 (3d Cir. 1999) ("Taking the 'effects test' to its logical extreme would for all practical purposes grant the federal government a general police power, the very danger the *Lopez*

Court warned us against." (internal quotation omitted)). As Justice Thomas has repeatedly warned, the "rootless and malleable" substantial effects test results in "Congress appropriating state police powers under the guise of regulating commerce." *Morrison*, 529 U.S. at 627 (Thomas, J., concurring); *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring) ("Unfortunately, we have never come to grips with th[e] implication[s] of our substantial effects formula. . . . [I] want to point out the necessity of refashioning a coherent test that does not tend to 'obliterate the distinction between what is national and what is local and create a completely centralized government.'" (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937))).

Nowhere is the confusion regarding the substantial effects test more apparent than in the ESA context. In upholding agency regulation of private land and intrastate species under the ESA, the circuits have relied on varied and conflicting rationales. In *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), the fractured panel majority held that the take of the Delhi Sands flower-loving fly substantially affected interstate commerce but disagreed as to why. One judge on the panel majority relied on the interconnectedness of species and ecosystems and thus aggregated the take of the fly with the take of all species. *Id.* at 1058-59 (Henderson, J., concurring). The other judge hypothesized that the loss of the fly could, in the aggregate, have substantial commercial consequences based on the loss of unknown genetic material and medicinal potential. *Id.* at 1052-53. In *Gibbs v. Babbitt*,

214 F.3d 483 (4th Cir. 2000), the panel majority focused on the economic impact of take of red wolves *as a species* in the aggregate and concluded that, if eradicated, "there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts."[4] *Id.* at 492. In *Rancho Viejo v. Norton*, 323 F.3d 1062, 1072-73 (D.C. Cir. 2003), the court looked to activities and motivations outside the take prohibition to find a substantial effect on interstate commerce. Specifically, the court determined that the regulated activity at issue was "plaintiff's construction project," which it found, was a commercial activity. *Id.* at 1072. In *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), the panel majority refused to aggregate either the future potential scientific benefits of the species at issue or take of the species with other endangered species, but relied on *Raich* to salvage the regulation as an essential part of the ESA's broad regulatory scheme, which it determined was economic.[5] *Id.* at 640. In sum, the circuits have varyingly aggregated take of all species, take of a single species, loss of potential scientific knowledge, commercial activity that may result in the take of a species, and none of the above in order to

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[4] The dissent found "humorous" the suggestion that "the red wolf pelt trade will once again emerge as a centerpiece of our Nation's economy[,]" but highlighted that language as exemplary of the absurd lengths to which courts will go to uphold federal regulation using the "substantial effects" test. *Gibbs*, 214 F.3d at 508-09 (Luttig, J., dissenting).

[5] The Tenth Circuit took the same approach in *PETPO*, rejecting application of the substantial effects test entirely. 852 F.3d at 1005-07.

uphold the regulation of intrastate species. These exercises in judicial gamesmanship seem a far cry from this Court's mandate in *SWANCC* to identify the "precise object or activity that, in the aggregate, substantially affects interstate commerce."[6] 531 U.S. at 173. The fact that the circuits' ESA decisions have provoked significant, vigorous dissents merely reinforces that the "substantial effects" test is not working. *See GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286, 287 (5th Cir. 2004) (Jones, J., dissenting from denial of reh'g en banc) (describing the panel majority's decision as "craft[ing] a constitutionally limitless theory of federal protection" that "offers but a remote, speculative, attenuated, indeed more than improbable connection to interstate commerce."); *Nat'l Ass'n of Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting) ("A creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might some day have a medical, scientific, or economic value which could then propel it into interstate commerce. There is no stopping point."); *Gibbs*, 214 F.3d at 508 (Luttig, J.,

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[6] In fact, *SWANCC* expressly rejected attempts to define the activity at issue outside the scope of the statute under which the agency was authorized to regulate. 531 U.S. at 173 ("[The precise activity at issue] is not clear, for although the [agency] has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now . . . focus upon the fact that the regulated activity is petitioner's municipal landfill, which is 'plainly of a commercial nature.' But this is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." (internal quotation omitted)).

dissenting) ("[I]f the Supreme Court were to render tomorrow the identical opinion that the majority does today . . . , both *Lopez* and *Morrison* would be consigned to aberration.").

The panel majority's decision takes the "substantial effects" test a step farther, effectively erasing any limit on the FWS's authority to regulate any land in the United States. First, it determined that the regulated activity to be aggregated is the regulation itself. This circular conclusion effectively insulates all critical habitat designations – and species listings – from Commerce Clause challenges.[7] If the "regulated activity" at issue is always framed as the regulation itself, whether a critical habitat designation or a species listing (or any other regulation), then a court will always be able to find that the designation of habitat or the

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[7] The panel majority's reliance on *GDF Realty* to find that the ESA is a broad "economic regulatory scheme" under *Raich* further highlights the importance of this Court's review. *See Markle Interests*, 827 F.3d at 476. The ESA is clearly directed at protecting species and their habitat, not at regulating commerce, however broadly one may define that term. Lee Pollack, *The "New" Commerce Clause: Does Section 9 of the ESA Pass Constitutional Muster After* Gonzales v. Raich*?*, 15 N.Y.U. Envtl. L.J. 205, 241-42 (2007) ("[A]ny commercial effects of the [ESA] would be purely incidental to the core of the statutory scheme, which is to preserve natural resources, a non-commercial topic clearly outside of Congress'[s] power to regulate under the Commerce Clause."); Comment, *Turning the Endangered Species Act Inside Out?*, 113 Yale L.J. 947, 952-53 (2004) (Arguing that *GDF Realty* erred in "making [the ESA's] master narrative a story about economics [because] the ESA is not about monetizing endangered species; it is about preserving them in their natural state. . . . The ESA's regulation of interstate commerce is merely circumstantial[.]").

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listing of the species substantially affects interstate commerce in the aggregate. *See Markle Interests*, 827 F.3d at 475-76. This novel interpretation of the Commerce Clause "would open a new and potentially vast domain to congressional authority." *NFIB*, 567 U.S. at 552 (opinion of Roberts, C.J.).

Second, the panel majority's decision ignores this Court's rule in *Morrison* that the link between the regulated activity and a substantial effect on interstate commerce must not be so attenuated as to leave no logical stopping point to the Commerce Clause power. 529 U.S. at 615 (rejecting "a method of reasoning that . . . [is] unworkable if we are to maintain the Constitution's enumeration of powers."); *see Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 198 (1974) (Rejecting Commerce Clause theory that "has no logical endpoint[]" and where "[t]he universe of arguably included activities would be broad and its limits nebulous in the extreme."). Under the panel majority's decision, "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." *Markle Interests*, 827 F.3d at 488 (Owen, J., dissenting). The majority's attempts to "cabin[]" the implications of granting the FWS powers more befitting a local zoning board fall short of providing a limiting principle. *Id.* at 488-89 (explaining the majority's contradictory conclusions that one physical or biological feature is necessary for designation, but that any land may be designated so long as it can be modified to contain such

feature). Indeed, following the panel majority decision, the FWS quickly implemented a regulation asserting that the ESA authorizes it to designate as critical habitat any unoccupied land it deems essential to the survival of a species, regardless of the presence of physical or biological features necessary for survival. 81 Fed. Reg. at 7,427. The FWS has thus unambiguously declared the path it intends to follow under its newfound authority – a path that "carr[ies] us [far] from the notion of a government of limited powers." *See NFIB*, 567 U.S. at 551 (opinion of Roberts, C.J.).

The ESA may be the "pitbull of all environmental legislation," but the Commerce Clause does not allow the FWS to reach private lands unconnected to any endangered or threatened species save for the presence of, at most, only one of the biological features necessary to sustain the species. This Court has emphasized that the government may not "pile inference upon inference" to make the connection between a regulated activity and interstate commerce. *Lopez*, 514 U.S. at 567. To maintain a "distinction between national and local authority[,]" *Morrison*, 529 U.S. at 615, the Commerce Clause must not be construed to allow the FWS to regulate private land that is not habitable and has no prospect of becoming so.

The Constitution must be interpreted to give effect to all its clauses. *See Marbury*, 5 U.S. at 174 ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."); *Lopez*, 514 U.S. at 588 (Thomas, J., concurring)

("After all, if Congress may regulate all matters that substantially affect commerce," then "many of Congress' other enumerated powers under Art. I, § 8[ ] are wholly superfluous."). However, under the "substantial effects" test, "[e]ven such a seemingly parochial action as borrowing a cup of sugar from a neighbor can be viewed as part of the stream of commerce that extends to refineries overseas." *McGuire*, 178 F.3d at 210. Justice Thomas's concern that the substantial effects test, "if taken to its logical extreme, would give Congress a 'police power' over all aspects of American life[,]" is certainly borne out by the panel majority's decision below. *See Lopez*, 514 U.S. at 584 (Thomas, J., concurring); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1418 (1987) (explaining that, in announcing the substantial effects test, "the Court acted as though any exercise of the congressional jurisdiction were benign").

In sum, under the panel majority's interpretation, the "substantial effects" test is merely an exercise in judicial imagination such that "one *always* can draw the circle broadly enough to cover the activity[.]" *Lopez*, 514 U.S. at 601 (emphasis in original) (Thomas, J., concurring). Drawing that circle so large that a federal agency may regulate any land in the United States under the auspices of the ESA is simply more weight than the Commerce Clause can bear. Therefore, this Court should take the opportunity to clarify the "substantial effects" test in order to place some limits on a federal agency's ability to regulate under the Commerce Clause.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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